Memorandum of Appeal filed and served on the 29th day of January, 1974 be treated as having been duly filed and served and that the necessary extension of time for filing and service of same be granted, notwithstanding this late application for extension of time, and further in the meanwhile execution be stayed on the aforesaid judgment and for such further and other relief as this Honourable Court may deem just." Notice of Preliminary Objections in respect of the application was filed and served on March 20, 1975 (enclosure 16) and on March 22, 1975 I dismissed the application with costs.

I had come to that decision because I considered that the decision I made on February 23, 1975 insofar as this court was concerned was final and that I had no power to set it aside. In *Lim Chiam Neo* v. *Tan See Tiam*[1] it was held that it was for the Court of Appeal to correct any errors or irregularities in the order of the trial judge as the trial judge had no jurisdiction to do so after judgment had been pronounced. Ismail Khan J. (as he then was) at page 146 said:

"As to the other grounds on which it is submitted in the alternative that I should discharge or vary the order of June 18, 1962, I now only say briefly that it is the Court of Appeal that should correct any of the errors or irregularities complained of. I have no jurisdiction to discharge or vary the order for the simple reason that after judgment pronounced I am *functus officio*."

It was contended by defendant that O.13 r. 10 of the Supreme Court Rules, 1957 could by analogy apply in this case. I did not agree with him. The said r. 10 deals specifically with setting aside judgment entered pursuant to any of the preceding rules of O.13 and I could not therefore see how it could be extended to this case, particularly when the issue had been vigorously argued before the decision was made. Under O.28 r. 11 only clerical mistakes or accidental omissions in judgments or orders may be corrected on motions or summons without an appeal.

Furthermore I was of the view that defendant should not be permitted to blow hot and cold and have a second bite at the cake. In *Broom's Legal Maxims*, 10th Edition, at page 103 it is stated that "He is not to be heard who alleges things contrary to each other." As defendant had previously maintained that he was not out of time he could not now be heard to the contrary and ask for some other remedy. The following passage from the judgment of Ong Hock Thye F.J. (as he then was) in *Natesan* v. *Goh Gok Hoon*[2] at page 8 is illustrative of the above-stated maxim: —

"Above everything else is the fact that the learned counsel for the appellant now sets up a case which not only is not founded upon, but contrary to, this appellant's own pleadings. We should be creating an absurd precedent to consider allowing this appeal, on any ground, without even any application for consequential amendment of the defence pleaded. Any amendment, at this stage, setting up a case which amounts to a *volte-face*, is naturally out of the question."

Order accordingly.

Solicitors: *D.A. Devadason; H.N. McLeod.*

PUBLIC PROSECUTOR v. YEOH ENG KHUAN

[A.Cr.J. (Abdoolcader J.) April 29, 1975]
[Ipoh — Criminal Appeal No. 76 of 1974]

Criminal Law and Procedure — Respondent convicted of offence under s. 39A, Dangerous Drugs Ordinance, 1952 — Binding over — Whether sentence adequate — Principles of sentencing — Criminal Procedure Code (F.M.S. Cap. 6), s. 294 — Dangerous Drugs Ordinance, 1952, s. 39A.

Dangerous Drugs — Possession — Dangerous Drugs Ordinance, 1952, s. 39A.

The respondent, a 20 year old youth, was convicted of an offence under section 39A of the Dangerous Drugs Ordinance, 1952. The learned President ordered that he be bound over for 2 years. The Public Prosecutor appealed against the inadequacy of the sentence.

Held, allowing the appeal: (1) unless the courts take a firm stand in the matter, the whole purpose of the legislature in enacting section 39A of the Ordinance which imposes a minimum mandatory term of imprisonment of 3 years and a maximum of 14 years would be lost;

(2) considering the amount and quantity of the drugs found in his possession, the respondent was not merely an addict but an operator of somewhat greater significance;

(3) the order of the learned President should be set aside and the respondent sentenced to imprisonment for 3 years.

CRIMINAL APPEAL.

Wan Abdul Majid bin Wan Hamid (Deputy Public Prosecutor) for the appellant.

S. Thevinthiran for the respondent.

Abdoolcader J. (delivering oral judgment): This is an appeal by the Public Prosecutor against an order made by the learned President of the Sessions Court, Ipoh, binding over the respondent in the sum of $2,000 in one surety for a period of 2 years on conviction for an offence under section 39A of the Dangerous Drugs Ordinance, 1952, to which he pleaded guilty. The Public Prosecutor now appeals against the inadequacy of the sentence.

I have considered carefully the submissions made by the learned Deputy Public Prosecutor and learned counsel for the respondent, and it would appear to me that unfortunately for the respondent this case does not strictly come within the purview of section 294 of the Criminal Procedure Code. The only point raised which is material for the purposes of that section is that he was some 20 years and 7 months at the time of the offence. Mr. Thevinthiran for the respondent also seeks to bring to my attention for consideration the extenuating circumstances under which the offence was committed. These I take it refer only to the statement made by the respondent that the drugs were the property of some other person who had run away. There was no evidence whatsoever to this effect and, in any event, the charge against the respondent is one of possession and not ownership.

Assuming for a moment I take into consideration the plea put forward by counsel for the respondent that the respondent had in his immediate possession when he was apprehended only 44 tubes of a substance which on analysis proved to contain 4.86 grammes of heroin and this would take the case outside the ambit of section 39A of the ordinance which prescribes a minimum of 5 grammes before it can apply, it must be borne in mind that he was then immediately taken back to the room from which he jumped out and there another 8 tubes of the substance were found which on analysis were found to contain 0.93 grammes

of heroin. The aggregate would bring the total amount of heroin found within the provisions of section 39A.

Drug taking is a menace and drug trafficking and pushing is becoming so rampant. Persons indulging in such activities are a scourge to society and unless the courts consider deterrence and the public interest as vital factors in sentencing, what would result would be a virtual licence for the kingpins of organisations in the drug trade to use young persons as a front not only in the hope that they themselves would escape punishment but also that the age of these hench-boys would deter the courts from sending them to prison. Unless the courts take a firm stand in the matter the whole purpose of the legislature in enacting in its wisdom section 39A of the Ordinance which imposes a minimum mandatory term of imprisonment of 3 years and a maximum of 14 years would be lost.

The facts of this case would clearly appear to suggest that the respondent is not merely an addict but an operator of somewhat greater significance, may be a pusher, may be even a trafficker, considering the amount and quantity of the drugs found in his possession.

In all the circumstances I do not think, much as I regret having to interfere with the sentence imposed by the subordinate court, that section 294 of the Criminal Procedure Code is the appropriate provision to apply. I would therefore set aside the order made by the learned President and impose on the respondent a sentence of imprisonment for a term of 3 years.

Appeal allowed.

Solicitors: *Thevin, Chandran & Siva.*

LAM KOK TRADING CO. (PTE.) LTD. & ANOR. v. YORKSHIRE SWITCHGEAR & ENGINEERING CO. LTD.

[O.C.J. (Abdul Hamid J.) October 10, 1975]
[Kuala Lumpur — Civil Suit No. 406 of 1974]

Practice and Procedure — Jurisdiction of court — Contract made outside jurisdiction — Breach of contract outside jurisdiction — Whether court in Malaysia has jurisdiction — Courts of Judicature Act, 1964, s. 23.

This was an application to set aside the writ of summons and all subsequent proceedings on the ground in effect that the courts in Malaysia have no jurisdiction to deal with the matter. In this case the contract was made outside the jurisdiction, the defendant was resident outside Malaysia and had no place of business within the jurisdiction and the breach of contract also occurred outside the jurisdiction.

Held: the court had no jurisdiction to deal with the matter and therefore the application must be allowed.

Cases referred to:-

(1) *Evans Marshall & Co. Ltd.* v. *Bertola and Independent Sherry Transporters Ltd.* [1973] 1 Lloyds Reports 453; [1973] 1 All E.R. 992.

(2) *Distillers Co. (Biochemicals) Ltd.* v. *Thompson* [1971] 1 All E.R. 694.

(3) *Jackson* v. *Spittall* (1870) L.R. 5 C.P. 542.

(4) *Cuban Atlantic Sugar Sales Corporation* v. *Compania de Vapores San Elefterio Limitada* [1960] 1 All E.R. 141.

CIVIL SUIT.

R. R. Sethu for the plaintiffs.

Henry Cheah and *Chin Yew Meng* for the defendants.

Abdul Hamid J.: The defendants Yorkshire Switchgear and Engineering Company, Limited are applying for an order pursuant to Order 12 rule 30 of the Rules of Supreme Court, 1957 that the writ of summons and service of the writ of summons and all subsequent proceedings be set aside on the ground that — (a) the parties to the agreement dated February 12, 1970 made between the defendants and the second plaintiffs (I shall hereafter call "the said agreement") have submitted to the jurisdiction of the English Court in that they have agreed that the proper law of the said agreement shall be the law of England; alternatively (b) that the proceedings herein be stayed on the ground that the parties hereto have agreed in the said agreement that all questions or differences whatsoever which may at any time hereafter arise between the parties hereto or their respective representatives touching these presents or the subject-matter thereto or arising out of or in relation thereto respectively and whether as to construction or otherwise shall be referred to arbitration in England in accordance with the provision of the Arbitration Act, 1950 of England or any re-enactment or statutory modification thereto for the time being in force.

Encik Henry Cheah counsel for the defendants/applicants in his affidavit of October 2, 1974 in support of the application referred to the said agreement whereby the second plaintiffs were appointed agents for the sale of all products manufactured by the defendants and such other goods and merchandise as may have been mutually agreed between them.

Under the said agreement the second plaintiffs agreed that payments by the defendants in respect of commissions on all products sold by the second plaintiffs be made in sterling. It was also a term of the said agreement that any dispute arising as to the amount of commission payable by the defendants to the second plaintiffs shall be settled by the auditors of the defendants.

Encik Henry Cheah pointed out that the defendants are a company with a limited liability, incorporated in England with a registered office at Meanwood Road, Leeds 6, England, and had not at any time established a place of business in Malaysia. Encik Cheah also pointed out that it was agreed that the said agreement shall in all respects be interpreted in accordance with the law of England.

It is the defendants' contention that in view of the provisions of the said agreement the proper law of this contract is the law of England and the writ issued by the court should therefore be set aside.

Alternatively and without prejudice to the foregoing it is the defendants' contention that this dispute ought to be referred to arbitration in England under Clause 13 of the said agreement in accordance with the Arbitration Act of England and the defendants were and are still willing to do all things necessary for the conduct of the arbitration.